

In The

Supreme Court, U.S.

FILED

DEC 28 1989

JOSEPH F. SPANIOL, JR.
CLERK

Supreme Court of the United States

October Term, 1989

PHILIP W. L. LUM,

Petitioner,

v.

RAYMOND JENSEN, ROBERT DRAKE, and
STATE OF CALIFORNIA,

Respondents.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

RESPONDENT'S BRIEF IN OPPOSITION

JOHN K. VAN DE KAMP,
Attorney General
of the State of California
RICHARD M. FRANK,
Supervising
Deputy Attorney General
*VINCENT J. SCALLY, Jr.
Deputy Attorney General
1515 K Street, Suite 511
P.O. Box 944255
Sacramento, CA 94244-2550
Counsel for Respondents
*Counsel of Record

QUESTIONS PRESENTED

1. In 1984, was the law clearly established that a public employee with a property interest in continued employment was entitled to substantive due process protection from an arbitrary, capricious, and pretextual termination?
2. Absent binding authority, is a lower court in an action under 42 U.S.C. section 1983 required to ascertain what the law in its jurisdiction would have been at the time of the alleged violation in determining if a defendant is entitled to qualified immunity because his conduct did not violate clearly established law?
3. What law is a court required to consider in determining if the conduct of a defendant in an action under 42 U.S.C. section 1983 violated clearly established law?

TABLE OF CONTENTS

	Page
RESPONDENT'S BRIEF IN OPPOSITION	1
STATEMENT OF THE CASE.....	1
A. Summary of Material Facts	1
B. Summary of Procedural History.....	1
REASONS WHY THE WRIT SHOULD BE DENIED ..	3
THE COURTS OF APPEALS ARE NOT IN CONFLICT OVER WHETHER OR NOT CLEARLY ESTABLISHED LAW GUARANTEES SUBSTANTIVE DUE PROCESS UNDER THE 14TH AMENDMENT TO PUBLIC EMPLOYEES WITH A PROPERTY INTEREST IN CONTINUING EMPLOYMENT.....	3
A. The Circuit Courts of Appeals Are Not In Conflict as to Whether The Law Is Clearly Established That Substantive Due Process Protects Public Employees With A Property Interest In Continuing Employment.....	4
B. No Supreme Court Precedent Establishes That Substantive Due Process Protects Continued Public Employment.....	6
THE WRIT SHOULD BE DENIED BECAUSE THIS COURT HAS SPECIFIED THE LAW THE LOWER COURTS ARE TO CONSIDER IN DETERMINING IF THE LAW IS CLEARLY ESTABLISHED AND BECAUSE THE NINTH CIRCUIT IN ITS DECISION BELOW DID CONSIDER WHETHER THE NINTH CIRCUIT OR THE SUPREME COURT WOULD HAVE FOLLOWED THE PRECEDENT OF OTHER CIRCUITS IN DETERMINING WHETHER THE LAW WAS CLEARLY ESTABLISHED.....	9
CONCLUSION	14

TABLE OF AUTHORITIES

	Page
Harlow v. Fitzgerald, 475 U.S. 800 (1982).....	10
Lum v. Jensen, 896 F.2d 1385 (9th Cir. 1989) <i>passim</i>	
Newman v. Commonwealth of Massachusetts, 884 F.2nd 19 (1st Cir. 1989)	5, 6, 7
Procunier v. Navarette, 434 U.S. 555 (1978).....	10
Regents of the University of Michigan v. Ewing, 474 U.S. 214 (1985)	12
Tribble v. Gardner, 860 F.2d 321 (9th Cir. 1988).....	10



RESPONDENT'S BRIEF IN OPPOSITION

Respondents Raymond Jensen and Robert Drake hereby submit their brief in opposition to the petition for a writ of certiorari, which seeks review of the decision of the United States Court of Appeals for the Ninth Circuit in this case.

STATEMENT OF THE CASE

A. Summary of Material Facts

Philip Lum was employed by the California Department of Justice as a criminalist, a civil service position. Raymond Jensen was Lum's supervisor and Robert Drake was Bureau Chief of Lum's division. On April 24, 1984, Lum was placed on paid administrative leave. On May 4, 1984, Lum was served with a Notice of Adverse Action terminating him from the Department of Justice effective May 18, 1984. On two previous occasions, Lum had met with the defendants to discuss Lum's job performance.

Lum appealed his termination to the State Personnel Board and the Board ordered Lum reinstated with back pay and benefits. He returned to work on September 3, 1985.

B. Summary of Procedural History

On January 26, 1986, Lum filed a complaint alleging a procedural due process violation and requesting general and punitive damages. On June 9, 1986, Lum filed an amended complaint, alleging denial of both procedural

and substantive due process. He claimed that the defendants denied him substantive due process because his termination was arbitrary, capricious, and pretextual.

On July 27, 1987, the defendants filed a motion for summary judgment seeking dismissal of both the procedural and substantive due process claims. They asserted the defense of qualified immunity on the ground that they had violated no clearly established constitutional right. On October 5, 1987, the district court issued an order granting summary judgment to the defendants on the procedural due process claim but denying the defendants' motion as to the substantive due process claim and the qualified immunity defense. The district court also denied Lum's motion for summary judgment, ruling that triable issues of fact existed as to whether the defendants' termination of Lum had been arbitrary, capricious, and pretextual.

On October 28, 1987, the defendants filed a timely appeal to the Ninth Circuit Court of Appeals from the order denying in part their motion for summary judgment. They argued that at the time Lum was fired, there was no clearly established substantive due process right to continued public employment that would preclude an arbitrary, capricious, and pretextual termination. They contended that because there was no clearly established right, they were entitled to qualified immunity as a matter of law.

On May 31, 1989, the Ninth Circuit Court of Appeals issued its decision and reversed the district court order. *Lum v. Jensen*, 896 F.2d 1385 (9th Cir. 1989). It held that there was no clearly established right to substantive due

process protection for Lum at the time of his termination and that the defendants were entitled to qualified immunity as a matter of law. The Court of Appeals directed summary judgment in defendants' favor.

On August 11, 1989, Lum's petition for rehearing was denied, and the suggestion for a rehearing en banc was rejected.

REASONS WHY THE WRIT SHOULD BE DENIED

I -

THE COURTS OF APPEALS ARE NOT IN CONFLICT OVER WHETHER OR NOT CLEARLY ESTABLISHED LAW GUARANTEES SUBSTANTIVE DUE PROCESS UNDER THE 14TH AMENDMENT TO PUBLIC EMPLOYEES WITH A PROPERTY INTEREST IN CONTINUING EMPLOYMENT

Petitioner argues that this Court should grant review because, he claims, the Courts of Appeals are divided over whether or not the law is clearly established that substantive due process protects public employees with a property interest in continuing employment. Petitioner also argues that the Ninth Circuit ignored this Court's precedent which he claims holds that substantive due process protects public employees with a property interest in continuing employment. Petitioner requests this Court to grant the writ in order "to reaffirm" that public employees with a property interest in continuing employment are guaranteed substantive due process protection and resolve the "division" among the circuits.

No such division exists. Notwithstanding petitioner's arguments, this Court's review is unwarranted and the writ should be denied. The Circuit Courts of Appeals are not in conflict over whether the law is clearly established that substantive due process protects public employees with a property interest in continuing employment. The only two circuit courts which have addressed the issue of whether the law is clearly established are consistent, not divided, on this issue. Also, this Court has never held that substantive due process protects public employees with a property interest in continuing employment. Therefore, this Court need not grant the writ in order "to reaffirm" prior precedent on this issue.

A. The Circuit Courts of Appeals Are Not In Conflict as to Whether The Law Is Clearly Established That Substantive Due Process Protects Public Employees With A Property Interest In Continuing Employment.

Contrary to petitioner's argument, the Circuit Courts of Appeals are not in conflict as to whether the law is clearly established that substantive due process protects public employees with a continuing interest in employment. Only two circuits have addressed the issue whether the law is clearly established; those decisions are consistent with each other.

The Ninth Circuit, of course, in its opinion below, addressed the issue of whether the law is clearly established and concluded that in 1984 there was no clearly established constitutional right to substantive due process protection of continued public employment. In

addressing the issue, the Ninth Circuit reviewed the decisions of this Court, the Ninth Circuit, and other Circuit Courts of Appeals. *Lum v. Jensen, supra*, 876 F.2d at 1387-1389. Through its review, the lower court concluded that there was no Supreme Court or Ninth Circuit precedent which established an entitlement to substantive due process protection for public employment. Its survey of the other circuits indicated that there was a conflict among the circuits that had reached the issue and the law was unsettled in the Ninth and the remaining circuits. Thus it concluded that there was no clearly established constitutional right to substantive due process protection of continued public employment in 1984.¹

The only other circuit court which has addressed the issue of whether the law is clearly established is the First Circuit in *Newman v. Commonwealth of Massachusetts*, 884 F.2d 19 (1st Cir. 1989), which considered the state of the law in 1983. In addressing the issue, the First Circuit also reviewed the decisions of this Court, the First Circuit, and the other Circuit Courts of Appeals. As did the Ninth Circuit in its decision below, the First Circuit concluded that there was no Supreme Court precedent which has established substantive due process protection for continuing public employment. Its survey of the other Circuit Courts of Appeals demonstrated the same conflict found by the Ninth among the circuits which had addressed the issue of whether substantive due process

¹ The lower court's opinion identified no cases which had addressed the issue of whether the law is clearly established, as distinct from the issue whether substantive due process protects continued public employment.

protection continued public employment. However, in reviewing the decisions of its own circuit, the First Circuit found clear precedent that there was substantive due process protection for continued public employment.

Upon its own precedent, the First Circuit held that the law was clearly established *in the First Circuit only* that there was substantive due process protection. On that basis, the First Circuit distinguished the Ninth Circuit's decision in *Lum v. Jensen*. The *Newman* court noted that the Ninth Circuit had addressed the issue of whether the law is clearly established and had concluded that in 1984 there was no clearly established constitutional right. But the *Newman* court found that its case was clearly distinguishable from *Lum* because of two First Circuit opinions which it deemed direct precedent. *Newman v. Commonwealth of Massachusetts, supra, 884 F.2d at 25, fn. 8.*

Thus the only two circuits which have addressed the issue of whether a clearly established right exists are consistent with each other. The Ninth Circuit found there was no clearly established constitutional right and the First Circuit found a clearly established right only in the First Circuit, distinguishing the decision in *Lum v. Jensen* on that basis. As there is no division in the Circuit Courts of Appeals on the issue of whether the law is clearly established, then this Court's review is unwarranted.

B. No Supreme Court Precedent Establishes That Substantive Due Process Protects Continued Public Employment

Supreme Court review is also unwarranted in order "to reaffirm" prior Supreme Court precedent on the issue

of whether substantive due process protects continued public employment. As both the First and Ninth Circuit Courts have held, there is no Supreme Court precedent which holds that substantive due process protects continued public employment. No circuit court has determined that Supreme Court precedent holds that substantive due process protects continued public employment. Therefore, petitioner's request to grant review in order "to reaffirm" that substantive due process protects continued public employment should be rejected because this Court has never so held.

As both the First and Ninth Circuits have concluded, there is a split in the circuits with respect to whether substantive due process protects continuing public employment, as distinct from whether the law is clearly established that such protection exists. See *Lum v. Jensen, supra*, 876 F.2d at 1388 and *Newman v. Commonwealth of Massachusetts, supra*, 884 F.2d at 25. However, this Court need not and should not resolve that split in this case because the distinct issue presented here is whether the law was clearly established in 1984 that substantive due process protects continuing public employment, not whether substantive due process presently does or should provide such protection for continuing public employment. Even if this Court were to hold in this case that substantive due process protection exists for continuing public employment, that would not affect the holding of the Ninth Circuit, which is that in 1984 there was no clearly established law on the question and the defendants were therefore entitled to qualified immunity.

Moreover, even if this Court were to grant review and hold that in 1984 clearly established law provided

substantive due process protection for continued public employment, the result in this case would yet remain unchanged. In the lower court defendants argued not only that there was no clearly established constitutional right to continued public employment but also argued that Lum was entitled to no relief because he was reinstated and awarded back pay and thus there was no final deprivation of his rights. The court did not address this argument because it held that there was no clearly established substantive due process protection for public employment at the time of Lum's termination. See *Lum v. Jensen, supra*, 876 F.2d at 1386, fn. 1. No case of this Court, of any circuit court, or of any district court has ever held or even intimated that substantive due process protects a public employee who is terminated but reinstated with back pay. All of the authority petitioner has cited in this Court and the lower court concerns public employees who were finally, or conclusively, deprived of their public employment. Because under no theory of substantive due process would a public employee in Lum's circumstances be deemed to have been denied his rights, then the lower court's decision would stand. For that reason as well, review should be denied.

In conclusion, because the Courts of Appeals are consistent on the issue of whether the law is clearly established that substantive due process protects public employees with a property interest in continuing employment, then the petition for review should be denied. The only two circuits which have addressed the issue, the First and the Ninth, are consistent in their holdings concerning whether in 1984 the law was clearly established that substantive due process protects a property interest

9

in continuing public employment. Both circuits are consistent in concluding that this Court has never held that such substantive due process protection exists. Therefore, review in this case is unnecessary in order "to reaffirm" prior Supreme Court precedent.

II

THE WRIT SHOULD BE DENIED BECAUSE THIS COURT HAS SPECIFIED THE LAW THE LOWER COURTS ARE TO CONSIDER IN DETERMINING IF THE LAW IS CLEARLY ESTABLISHED AND BECAUSE THE NINTH CIRCUIT IN ITS DECISION BELOW DID CONSIDER WHETHER THE NINTH CIRCUIT OR THE SUPREME COURT WOULD HAVE FOLLOWED THE PRECEDENT OF OTHER CIRCUITS IN DETERMINING WHETHER THE LAW WAS CLEARLY ESTABLISHED

Petitioner argues that the writ should be granted in order for this Court to specify the law which the lower courts are to consider in determining if the law is clearly established, and to require the lower courts, in the absence of precedent in their own jurisdiction, to determine what the law in their jurisdiction would have been at the time of the violation of the putative right. Review is unwarranted for these reasons because this Court has previously specified the law which the lower courts are to consider in determining if the law is "clearly established." Review is also unwarranted because the Ninth Circuit in this case, following Ninth Circuit precedent, did determine in its qualified immunity analysis whether the Ninth Circuit or the Supreme Court would have followed the precedent of other circuits at the time of the violation.

First, the Supreme Court has previously specified the law that the lower courts are to consider in determining whether the law is clearly established. The lower courts are to consider the opinions of this Court, of the Courts of Appeals, or the local district court. *Procurier v. Navarette*, 434 U.S. 555, 565 (1978); *Harlow v. Fitzgerald*, 475 U.S. 800, 818, fn. 32 (1982). By specifying the law which is to be considered in this analysis, this Court has never precluded consideration of other sources of law. No Circuit Courts of Appeals have limited the sources of law which are to be considered or precluded consideration of any source of law. Thus, the lower courts should consider Supreme Court, Court of Appeals, and District Court opinions, and may consider other sources which indicate whether or not the law is clearly established.

As petitioner correctly notes, the Ninth Circuit examines all available case law to determine whether a law is clearly established. See Petition, p. 13; *Tribble v. Gardner*, 860 F.2d 321, 323 (9th Cir. 1988). In this case the Ninth Circuit considered all available case law, reviewing the precedents of this Court, the Ninth Circuit, and the other Circuit Courts of Appeals. Petitioner specifies no source of law or available case law which the Ninth Circuit failed to consider in its analysis in this case.

Contrary to petitioner's assertion, the Circuit Courts of Appeals are undivided on the issue of what law the lower courts are to consider in determining whether the law is clearly established. Petitioner refers to decisions of various circuits in which the courts considered various sources of law or available case law. (See Petition, pp. 12-14.) None of these cases holds that the lower courts in

qualified immunity analysis may not consider any particular source or available case law. In the decisions petitioner cites, the lower courts may have considered different or varying sources of law or available case law. Those differences are simply a function of what law was available and pertinent to the question presented in each case. None of the cases held that any particular source or case law could not be considered in its analysis. Any variations in the cases cited occurred because of the circumstances in each case. The cases demonstrate no division among the Circuit Courts of Appeals on the issue of what law the lower courts are to consider in the qualified immunity analysis. Therefore, this Court need not grant review to consider this issue.

Supreme Court review is also unwarranted in order to require the lower courts, in the absence of precedent in their jurisdictions, to determine what the law in their jurisdictions would have been at the time of the violation. The lower court in this case, consistent with Ninth Circuit precedent, did determine, in the absence of precedent in the Ninth Circuit, whether the Ninth Circuit or the Supreme Court would have followed the precedent of other circuits. Contrary to petitioner's assertion (see Petition, p. 14), the lower court in this case did not hold that the split among the Circuit Courts of Appeals on the issue of whether substantive due process protects the property interest and continuing public employment "automatically" determined that the law is not clearly established.

In considering whether the law was clearly established in 1984, the lower court in this case stated that "when there is no binding precedent on an issue, a part of

our task under the qualified immunity analysis is to determine whether this circuit or the Supreme Court would have followed the precedent of other circuits. Thus, we examine *Harrah* to determine whether it provides a clear indication that the Supreme Court would have resolved the inter-circuit conflict in favor of recognizing the substantive due process right." *Lum v. Jensen*, 876 F.2d at 1388-89. The lower court then analyzed the *Harrah* decision as well as this Court's decision in *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985), to conclude that this Court is still uncertain as to the nature of substantive due process protection. That determination was part of the lower court's qualified immunity analysis.

The lower court did not conclude "automatically" that the law was not clearly established because of the inter-circuit conflict on the issue of whether substantive due process protection exists in the area of public employment. The lower court noted that the circuits disagree as to whether inter-circuit conflict on a point of law negates the clearly established nature of a right, noting that the Tenth Circuit has stated that the presence of a conflict is relevant to the qualified immunity inquiry, but not controlling, but that one Seventh Circuit opinion has stated that if there is a conflict among the circuits, the law will not be clearly established until there is a definitive resolution of the conflict by the Supreme Court. See *Lum v. Jensen, supra*, 876 F.2d at 1389. The lower court did not assume that the inter-circuit conflict negates the clearly established nature of a right. In reaching that conclusion, the court considered not only the conflict between the circuits that had reached the issue of substantive due

process protection, but also the absence of binding precedent in the Ninth Circuit, the unsettled state of the law in the remaining circuits, and the absence of explicit direction from the Supreme Court. In light of all those considerations, the lower court concluded that there was no clearly established constitutional right to substantive due process protection of continued public employment. Because the lower court in this case did conduct the analysis which petitioner would have this Court require of all the circuits, then the decision in this case would remain the same even should this court grant review. Therefore, review is unwarranted.

In conclusion, this Court's review of the lower court decision is unwarranted. First, this Court has made clear what sources of law the lower courts are to consider in the qualified immunity analysis. None of the lower courts have in any way limited the sources of law which are to be considered in this analysis. There is no division among the Circuit Courts of Appeals on this issue. Second, review in this case is unwarranted because the lower court in this case, as part of its qualified immunity analysis, did determine whether the Ninth Circuit would have followed the precedent of other circuits, conducting the very analysis which petitioner would ask this Court to impose on all the circuits. Thus, even if this Court required such a determination in the qualified immunity analysis, the result in this case would not change. Therefore, this Court should deny review.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

DATED: December 28, 1989

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General

RICHARD M. FRANK, Supervising
Deputy Attorney General

VINCENT J. SCALLY, JR.
Deputy Attorney General

Attorneys for Respondents

